

No. 84-709

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ALEXANDER L. STEVAS,
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In The
Supreme Court of the United States

October Term, 1984

—o—
UNITED STATES OF AMERICA EX REL.
SEYMOUR BUXBOM,

Petitioner,

v.

NAEGELE OUTDOOR ADVERTISING COMPANY
OF CALIFORNIA, INC., a California corporation,

Respondent.

—o—
On Petition for a Writ of Certiorari to the
Ninth Circuit Court of Appeals

—o—
**BRIEF IN OPPOSITION OF
PETITION FOR WRIT OF CERTIORARI**

—o—
BEST, BEST & KRIEGER
Attorneys at Law
By: RICHARD CROSS, Esq.
4200 Orange Street
Post Office Box 1028
Riverside, California 92502
Telephone: (714) 686-1450

Attorneys for Respondent

QUESTIONS FOR REVIEW

1. Where an Indian tribe has appealed to the Interior Board of Indian Appeals the refusal of an official of the Bureau of Indian Affairs ("BIA") to approve a proposed lease agreement with a non-Indian, and while the appeal was pending entered into a separate agency agreement without again seeking the prior approval of the Interior Department; and where the Interior Board of Indian Appeals has subsequently overruled the official's refusal and instructed the Bureau of Indian Affairs to effectuate a business lease, all prior to the filing of an action pursuant to 25 U.S.C. § 81 by a non-Indian business competitor of the non-Indian contracting party; does the BIA's failure to effectuate a lease until after the relator has obtained judgment for violation of section 81 bar the Court of Appeals from declaring the section 81 action moot when the BIA, pursuant to the request of the affected non-party Indian tribe, has approved the agency agreement as a lease, retroactive to the date when the tribe and the non-Indian entered into the agency agreement?

2. Was the Ninth Circuit Court of Appeals correct in holding (1) that standing to sue pursuant to 25 U.S.C. § 81 depends not on whether a tribe paid consideration prior to obtaining Secretarial approval but solely on whether the agreement has been approved by the Secretary, and therefore (2) that the relator's section 81 action became moot when the Interior Department approved the agreement retroactive to the date of its original execution by the affected Indian tribe and the non-Indian?

3. Where a penalty action pursuant to 25 U.S.C. § 81 is opposed by both the affected Indian tribe and the

United States Government; and where the Interior Department has, prior to the filing of any action pursuant to section 81, ordered the BIA to effectuate a business lease and the BIA has subsequently approved the subject agency agreement as a lease, retroactive to its original date of execution; should this Court reinstate the overruled District Court judgment, in spite of the adverse effect that judgment would have on the tribe and the narrowing effect it would have on tribal sovereign rights, for the sole reason that a symbolic consideration has passed from the affected tribe to the non-Indian prior to the retroactive approval of the agreement by the Interior Department?

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STATEMENT OF THE CASE

This was an action pursuant to 25 U.S.C. § 81 by Seymour Buxbom ("Buxbom"), the non-Indian owner of a competing outdoor advertising business (Desert Outdoor Advertising, Inc. ("Desert")), against Naegele Outdoor Advertising Company of California, Inc. ("NOAC"). Buxbom, as relator, alleged (1) that NOAC violated 25 U.S.C. §§ 81 and 415 by entering into an agency agreement with the Morongo Band of Mission Indians without obtaining the prior approval of the Secretary of the Interior and the Commissioner of Indian Affairs, and therefore (2) that NOAC was liable to Buxbom and the United States Government in an amount equal to sums allegedly paid to NOAC by the Band pursuant to the agency agreement, to wit, \$60,000 (\$30,000 to Buxbom and \$30,000 to the United States Government).

The Morongo Band of Mission Indians is a sovereign, federally recognized Indian Tribe and the beneficial owner of the Morongo Indian Reservation, which is held in trust for the Band's exclusive use and benefit by the United States of America. *See Morongo Band of Mission Indians v. Area Director, Sacramento Office*, 7 Interior Board of Indian Appeals 299, 86 Int. Dec. 680, 681-82 (1979) (Morongo). Less than one square mile of the Band's 32,300 acre Reservation is suitable for commercial economic development. That square mile is a strip lying along the northern side of Interstate Highway 10, the major east-west artery for travel to and from metropolitan Southern California. *Id.*

In 1963, the Band's general membership delegated to the Morongo Tribal Council authority to negotiate out-

door advertising agreements. In late 1977 and early 1978, the Band conducted negotiations with several outdoor advertising businesses, including Desert and NOAC. See *Moronga, supra*, 86 Int. Dec. at 683-84 n. 7. On the basis of the more favorable terms offered by NOAC, the Band negotiated a lease with NOAC.

Since 25 U.S.C. § 415 and 25 C.F.R. § 162 require the approval of the Department of the Interior for such leases, the Band and NOAC submitted the lease to the local Bureau of Indian Affairs office for approval. That local office disapproved the lease on the ground that it violated the federal Highway Beautification Act (23 U.S.C. §§ 131 *et seq.*) (HBA) and the California Outdoor Advertising Act (Cal. Bus. & Prof. Code §§ 5200 *et seq.*). On March 14, 1978, the Area Director of the BIA upheld the disapproval. The Band then appealed to the Commissioner of Indian Affairs, who did not act on the appeal within the 30 days required by 25 C.F.R. § 2.19(a). The appeal therefore was automatically referred to the Interior Board of Indian Appeals. See 25 C.F.R. § 2.19(b) (1983).

On December 13, 1979, the Interior Board of Indian Appeals reversed the decision of the Area Director and remanded the case to the Acting Deputy Commissioner of Indian Affairs, with instructions that the BIA "seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegle Company consistent with this opinion." *Morongo, supra*, 86 Int. Dec. at 692. The Board's action was that of the highest authority within the Department of the Interior and is final for the Department. *Id.*; see 43 C.F.R. § 4.1 (1983).

On March 30, 1978, while the Band's appeal of the Area Director's decisions was still pending, the Band and NOAC entered into a written agency agreement. Pursuant to the agency agreement NOAC agreed to and subsequently did install and operate 15 outdoor advertising signs on the Morongo Reservation. It paid the Band \$310,000, \$60,000 for the right to become the Band's agent and \$250,000 as prepayment for the privilege of operating the Band's outdoor advertising business for ten years. Sixty thousand dollars of the \$310,000 was immediately returned to NOAC by the Band, in recognition of the fact that NOAC was to bear the entire cost of building this part of the Band's outdoor advertising sign plant. Except for the return of the \$60,000 of the \$310,000 NOAC had paid it, the Band never paid any money to NOAC.

Buxbom filed his complaint in this action on December 3, 1982. The Morongo Band was not named as a defendant. On February 28, 1983, NOAC moved to dismiss on the grounds (1) that the Morongo Band was an indispensable party that had not been (and could not be) joined; (2) that NOAC, as the Band's agent, was protected by the Band's sovereign immunity to suit; and (3) that the agency agreement was not within the purview of section 81's prescription. The motion was argued on March 28, 1983. At the conclusion of the hearing, the District Court took the motion off calendar, to be recalendared after plaitniff had filed a motion for summary judgment.

In June 1983 the District Court heard oral argument of NOAC's and Desert's cross-motions for summary judgment, and on June 23 the Court filed its memorandum opinion by which it (a) denied NOAC's motions to dismiss and for summary judgment; (b) granted Buxbom's summary

judgment motion, on the sole ground that NOAC had failed to comply with the requirements of 25 U.S.C. § 81; and (c) set aside the agency agreement between the Band and NOAC. On July 8, 1983, the district court filed a judgment awarding \$30,000 to Buxbom and an equal amount to the United States of America.

NOAC then appealed to the Ninth Circuit Court of Appeals. Opening, opposition and reply briefs were filed; the Court granted the petitions of the Morongo Band and the United States Government for leave to file *amicus curiae* briefs. By a petition for judicial notice filed on February 3, 1984, appellant NOAC apprised the Ninth Circuit of the fact that on February 2, 1984, the Acting Superintendent for the Southern California Agency of the Bureau of Indian Affairs, at the direction of the Area Director, had approved the Morongo-NOAC agency agreement, retroactive to March 30, 1978, the date when the agency agreement originally was entered into by NOAC and the Band. (*See Appendix.*)

On February 8, 1984, the Ninth Circuit heard oral argument of NOAC's appeal, and at that time it requested the parties to prepare supplemental briefs regarding the following questions: (1) what the effect was of the February 2, 1984 written approval issued by the Bureau of Indian Affairs, including in particular the question whether the written approval was properly retroactive to March 30, 1978; and (2) whether the action should be remanded to the District Court for determination of the above questions and for reconsideration of what relief, if any, was proper. All parties submitted briefs as requested by the Court, and on May 7, 1984, NOAC filed its Notice of Motion Requesting *Munsingwear* Disposition, by which it moved the

Ninth Circuit for an order reversing and vacating the District Court decision below and remanding the action to the District Court with directions to dismiss it.

On August 3, 1984, the Ninth Circuit Court of Appeals issued its Opinion reversing the decision of the District Court and remanding the case with directions to dismiss the relator's action. *United States ex rel. Buxbom v. Naegele Outdoor Advertising Company of California, Inc.*, 739 F.2d 473, 474 (9th Cir. 1984) (Buxbom).

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ARGUMENT

1. Buxbom's Single Claim Is That The Decision Below Was Wrong As A Matter Of Law.

Buxbom's petition for certiorari is limited solely to the claim that the decision below is erroneous. He does not claim that the Ninth Circuit has rendered a decision in conflict with any other federal appellate decisions, nor does he claim that the Ninth Circuit has decided any federal question in a way that conflicts with the decision of a state court of last resort. *Cf.* Sup.Ct.R. 17.1(a). He does not even go so far as to say that the question of which he seeks review is important or conflicts with applicable decisions of this Court. *Cf.* Sup.Ct.R. 17.1(c). Buxbom's grounds for seeking relief of the decision below are limited apparently to the sole contention that the decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Cf.* Sup.Ct.R. 17.1(a).

In the decision below the Ninth Circuit affirmed that the BIA had the power to approve the agency agreement

retroactively and that such approval precluded any judgment that the agreement between the Band and Naegele is void. *Buxbom, supra*, 739 F.2d at 474. It then rejected Buxbom's contention that his rights under section 81 had vested when the \$60,000 "payment" passed from the Band to NOAC, on the ground that section 81's statutory penalty attaches *only* if the agreement at issue is made without BIA approval; it does not make actionable a payment simply because it occurs prior to a *nunc pro tunc* approval of an agreement by the Interior Department. *See id.*

Buxbom challenges this holding on what is essentially a single ground.² He argues that section 81, notwithstanding its language, levies a penalty for taking tribal monies without the approval of the Secretary and the Commissioner (Brief for Petitioner at 7); he says it is undisputed that NOAC "took" \$60,000 (*id.* at 8) and that the BIA's retroactive approval cannot operate to "forgive the interim violation of the statute . . ." (*id.* at 9). He contends that any construction other than his would effectively prevent the allegedly applicable statute of limitations from ever accruing. *Id.* And he suggests that 18 U.S.C. § 438, which prescribes a criminal punishment to be imposed against anyone who "receives money *contrary to* sections 81 and 82 [of Title 25] . . ." (emphasis added), supports his construction of section 81. *Id.* at 8.

NOAC respectfully submits that these contentions are without merit. Further, to decide this case in the manner suggested by Buxbom (1) would be contrary to the basic purpose of section 81 and (2) would frustrate both the exercise by the Interior Department of its supervisory responsibilities and the current congressional and execu-

tive policy favoring attempts by Indian tribes to better themselves economically. Finally, even assuming Buxbom's interpretation of when a cause of action arises under section 81 is correct, he has lacked standing to bring this action since December 13, 1979, when the Interior Board of Indian Appeals decided *Morongo*.

2. Buxbom's Arguments Against The Ninth Circuit's Interpretation Of Section 81 Are Without Merit.

In its present form 25 U.S.C. § 81 (Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570, *amended by* Act of May 21, 1872, ch. 177, §§ 1-3, 17 Stat. 136, *codified as amended at* 25 U.S.C. § 81) provides that certain agreements are "null and void" unless executed in compliance with five listed conditions, the second of which is that the agreement "must bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it." The final paragraph of section 81 provides not only that agreements that do not comply with the five listed requirements "shall be null and void . . ." but that:

[A]ll money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid to the Treasury for the use of the Indian or tribe by or for whom it was so paid. *Id.*

The first and most obvious defect in the argument proffered by Buxbom is that it ignores the language of the

statute. As the Ninth Circuit observed, section 81 does not state that "no consideration shall be paid prior to approval by the Secretary." Rather, it provides that "[n]o agreement shall be made . . . unless . . . [i]t shall bear the approval of the Secretary . . . indorsed upon it." Section 81's penalty attaches, therefore, only if the agreement in question lacks BIA approval. In this case the BIA approved the agency agreement *nunc pro tunc* to the date of its original execution. Buxbom's action therefore fails.

Buxbom does not challenge the above interpretation directly. Rather, he attempts to demonstrate that it jars with related statutes and is unworkable. Thus, he first calls to our attention 18 U.S.C. § 438, which specifies what criminal punishment shall be imposed upon one who "receives money *contrary to* sections 81 and 82 . . ." (emphasis added). See Brief for Petitioner at 8. However, section 438 adds nothing to our understanding of 25 U.S.C. § 81. It comes into play only if there has already been a violation of section 81; it sheds no light on when, and under what circumstances, a violation of section 81 will be deemed to have occurred.

Buxbom next argues that the Ninth Circuit's interpretation of section 81 is unworkable because it transforms the unauthorized acceptance of tribal monies into a "contingent crime," that is, a violation that might never accrue because there would always be the possibility that the BIA would someday approve retroactively an agreement otherwise violative of section 81. Brief for Petitioner at 9. In effect, Buxbom is saying that where, as here, a BIA official has refused to approve an agreement and thereupon the *affected tribe* has (1) appealed the refusal and (2) proceeded to enter into a contract with a non-Indian, a re-

lator may, pursuant to section 81, sue for and recover whatever sum was paid by the affected tribe to the non-Indian, regardless of whether the original agreement is in the end approved by the Interior Department, and regardless of the fact that the approval of the contract relates back to the date when the parties entered it.¹

Buxbom's interpretation is, not surprisingly, concerned first and foremost with whatever opportunities for third party profit are created by this statute. It is not in keeping with what obviously was the primary purpose of section 81, namely, the protection and betterment of Indians and tribes. *See* Cong. Globe, 41st Cong. 1st Sess. 1483 ff. (Feb. 22, 1877). The correct theory of accrual is the one suggested by the Interior Department's current regulations governing the appeal of BIA administrative actions, to wit, that no claim under section 81 accrues until there has been final agency action on whether a proposed tribal-non-Indian agreement shall be approved.

Under the BIA's current regulations, this appeal period is thirty-one days from notice of the decision complained of. *See* 40 Fed. Reg. 20626 (May 12, 1975), *codified as*, 25 C.F.R. § 2.10(a) (1983). If an administrative appeal has timely been filed by an Indian or tribe, the right of a relator to sue for damages under section 81 does not accrue until there has been final agency action. Of course, if the Interior Department finally approves

¹ It should be noted that Buxbom's argument assumes the applicability of section 81 to the agreement in question. In effect, Buxbom is arguing that the BIA's retroactive approval does not relieve this Court from having to determine whether the agency agreement is subject to section 81. The Ninth Circuit wisely avoided this issue in its decision below. *See Buxbom, supra*, 739 F.2d at 474.

the proposed lease or other agreement, the approval precludes any claim pursuant to section 81.

This alternative interpretation of what triggers the right to sue under section 81 is far preferable to Buxbom's theory of accrual under section 81. His interpretation would have a serious chilling effect on the willingness of non-Indnans to make contracts with Indians or tribes, since non-Indians would enter such contracts only where they were willing to wait a considerable length of time before being able to commence performance under the contract. Further, for each contract lost because the parties were unwilling to risk such substantial delays, the Department of Interior would lose the opportunity to decide what agreements it would approve (and subject to what conditions), and as a result it would lose an opportunity to make policy in this area. Finally, and by no means least significant, Indians and tribes would in the long run lose significant opportunities to better themselves economically and, by a process of trial and error, to determine what contracts, if any, are outside the scope of section 81 and within the scope of inherent tribal sovereign powers.

In this case the Morongo Band timely appealed to the Interior Board of Indian Appeals, which vacated the Sacramento Area Director's disapproval of the proposed lease and remanded the matter to the Acting Deputy Commissioner of Indian Affairs with instructions that the BIA "seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion." *Morongo, supra*, 86 Int. Dec. at 692. Thereafter, the BIA failed to take formal steps to implement these instructions until October of 1983, when counsel for the Morongo Band wrote the Area Director and requested the BIA to effectuate a business lease as directed

by the Interior Board of Indian Appeals. *See* Feb. 2, 1984 Approval of the Acting Superintendent, Bureau of Indian Affairs, Southern California Agency & Exh. A thereto (Appendix A hereto). Thereupon the Area Director completed the process of complying with the Interior Board of Indian Appeals' order of 1979 by formerly according retroactive approval to the March 30, 1978 agency agreement.

For the reasons set forth above, this Court should refuse Buxbom's petition and leave undisturbed the decision of the Ninth Circuit, which respects the plain language of section 81, permits the unimpaired exercise of the Secretary's supervisory powers, and avoids encroaching on tribal sovereignty and tribal attempts at economic self-development.

3. Even Assuming The Validity Of Buxbom's Interpretation Of Section 81, He Lost Standing To Bring This Action In December 1979.

The formal approval accorded the agency agreement on February 2 of this year originally was ordered by the Interior Department in December 1979. *See Morongo, supra*. Thus, Buxbom actually brought his lawsuit *after* the Interior Board of Indian Appeals had ordered the BIA to effectuate a lease between NOAC and the Morongo Band. Consequently, even if Buxbom is correct that the right of action conferred by section 81 was triggered when the Morongo Band made an unapproved "payment" to NOAC, Buxbom's right to bring an action to recover the amount of that payment expired when the Interior Department concluded that the proposed lease agreement between NOAC and the Band was legal and should be approved. As a result, Buxbom lost whatever standing he may once have had to bring this lawsuit when the BIA issued its opinion in *Morongo, supra*. To decide other-

wise would be to hold that Buxbom could recover the section 81 penalty simply because the Interior Department, for reasons best known to it, had refrained from completing the formality of according written approval to the agency agreement.

Buxbom's action is really nothing but an attempt to challenge the Interior Department's final determination that the agency agreement between the Band and NOAC should be treated as a lease and granted retroactive approval. Section 81 grants no standing to bring an action of this kind.

The possibility remains of course that the agency agreement was not a section 81-type contract — in which case section 81 was never violated and Buxbom has no standing to bring this action. The upshot is that even under Buxbom's interpretation of when a right of action under section 81 accrues, his action either is untimely (and thus he has no standing) or it could not have been brought in the first place.

CONCLUSION

For the foregoing reasons respondent NOAC respectfully requests that this Court deny Buxbom's petition for writ of certiorari.

Dated: November 27, 1984.

BEST, BEST & KRIEGER

by /s/ RICHARD CROSS
Attorneys for Naegele Outdoor
Advertising Company of California, Inc.

App. 1

APPENDIX

Approved for a period of 10 years retroactive to the execution of the Agency Agreement on March 30, 1978 as entered into by Thomas Lyons, Chairman, Morongo Band of Mission Indians and Leon E. Howell, President, Naegele Outdoor Advertising Company of California, Inc.

This document is executed pursuant to Sacramento Area Office Redelegation of Authority Order No. 1, July 3, 1978, which specifies under Section 2.3, that the Superintendent may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Acting Superintendent, Southern California Agency, herein exercises the redelegated authority. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

Where references are made to the Band as to approvals, consents and authorizations, the words "and the Secretary" will be added after Band.

Approved in accordance with the letter of the Area Director, Sacramento Area Office, dated November 15, 1983, a copy of which by this reference is made a part hereof. See Exhibit "A".

Approved February 2, 1984 reactive [*sic*] to March 30, 1978.

/s/ WILLIAM H. GIANELLI

Acting Superintendent

Pursuant to the authority delegated by
209 DM 8, 10 BIAM 3.1, and Sacramento
Area Office Redelegation Order No. 1
(43 F.R. 30131).

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EXHIBIT "A"

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

(SEAL)

November 15, 1983

Barbara E. Karshmer, Esq.
Attorney at Law
925 N Street, Suite 150
Fresno, California 93721-2256

Dear Ms. Karshmer:

This refers to your letter of October 27, 1983, concerning an Agency Agreement between the Morongo Band of Mission Indians and Naegele Outdoor Advertising Company. The matter was the subject of a decision from the Interior Board of Indian Appeals which held that a contemplated lease of certain lands on the Morongo Indian Reservation for outdoor advertising purposes would not be regulated by State law or the Highway Beautification Act.

Your letter requests that the Bureau of Indian Affairs seek to "effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company", as directed by the Interior Board of Indian Appeals, in the approval of the agency agreement executed between the Band and Naegele, on March 30, 1978. You further requested that said approval be issued retroactively to March 30, 1978, in view of the Interior Board of Indian Appeals' decision and in order that the Band may attempt to persuade the Ninth Circuit Court of Appeals to remand the case of *U.S. ex rel Buxbom v. Naegele*, to the District Court for a new decision in light of the changed facts.

Sacramento Area Office Redelelegation of Authority Order No. 1, July 3, 1978, specifies under Sec. 2.3, that the Super-

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intendents and the Director, Palm Springs Office, may exercise the authority of the Area Director in relation to the following: (f) all those matters set forth in 25 CFR 131 (now 162), except for leases and permits with terms in excess of ten (10) years. Therefore, the Superintendent, Southern California Agency, by copy of this letter, is requested to exercise his redelegated authority with respect to your request. You are requested to provide the Superintendent, with the original agreement, if at all possible. If the original agreement is unavailable, the Southern California Agency will prepare an approval page for attachment to the copy, with appropriate references to that certain agreement entered into by the parties on March 30, 1978.

It is suggested that where references are made to the Band as to approvals, consents and authorizations, that "and the Secretary" be added after Band.

Sincerely,
/s/ JESS T. TOWN
Area Director

cc: Superintendent, SCA, w/copy of incoming for action.

J